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In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM D. JOHNSON, PETITIONER

v.

POWELL F. CARTER AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the Commander-in-Chief of the United States Navy Atlantic Fleet was acting within the scope of his office at the Norfolk Naval Base when he allegedly called a civilian base policeman a "liar" during a conversation about the police officer's on-duty conduct.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A38) is reported at 983 F.2d 1316. The original panel opinion (Pet. App. A40-A67) is reported at 939 F.2d 180. The district court's oral order denying the government's motion for substitution (see Pet. App. A82-A83) and the district court's subsequent order denying the government's motion for reconsideration and for dismissal (Pet. App. A71-A75) are not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 15, 1993. The petition for a writ of

certiorari was filed on April 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. As a practical matter, the Westfall Act provides immunity to government employees acting within the scope of their employment by requiring that the United States be substituted as the defendant and that the suit proceed against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The Westfall Act states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil

> action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d). The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1).

The Attorney General has delegated the authority to certify that an employee was acting within the scope of the employee's office or employment to the United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3. The Attorney General's delegation authority is set forth in 28 U.S.C. 510.

2. Respondent Admiral Powell F. Carter, Jr. was Commander-in-Chief of the United States Navy Atlantic Fleet during the time period relevant to this case. On Sunday, June 18, 1989, Admiral Carter's daughter Janeen visited her parents' home on the Norfolk Naval Base. After the visit, Janeen left in her own car and was stopped by petitioner, William D.

Johnson, a civilian employee of the Naval Base Security Force. Petitioner claimed that Janeen was speeding and gave her a warning. Janeen's mother, who was escorting Janeen off the base in a separate car, pulled over and observed the stop. According to Janeen and Mrs. Carter, petitioner was rude and intimidating during the stop. When Mrs. Carter returned home, she told her husband what had happened and gave him the vehicle number of petitioner's patrol car. Pet. App. A3.

From the time he assumed command of the Atlantic Fleet in November 1988, Admiral Carter had received several reports of rude, unprofessional behavior on the part of security force personnel. On several occasions, Admiral Carter expressed his desire to the Base Commander, Rear-Admiral Pappas, that civilian police officers be made to understand that they must carry out their duties courteously and helpfully. Pet. App. A3, A14-A15. Accordingly, when Admiral Carter learned that a base policeman had been rude to Mrs. Carter and their daughter, he sought to identify the patrolman in order to file a formal complaint about the incident. *Id.* at A3.

The Norfolk Naval Base consists of the Naval Station, the Naval Air Station, and the Atlantic Fleet Support Activity. Admiral Carter attempted to contact the Naval Base commander and the Naval Base commanding officer. Eventually, he reached the Naval Station duty petty officer and asked that a duty officer and a security force supervisor report to him so that he could learn the identity of the patrolman in question. A Naval Station duty officer, a security force supervisor, and petitioner went to Admiral Carter's home. Admiral Carter related his wife's

account of what had happened and, when he learned that petitioner was present, asked petitioner whether he had been rude. Petitioner denied that he had been rude, and, according to petitioner, Admiral Carter replied, "You are a liar." Pet. App. A4. Admiral Carter then directed the security force supervisor to instruct his personnel properly in dealing with the public and dismissed the three individuals. *Ibid.*

The next day, Admiral Carter lodged a formal complaint against petitioner. The incident was reported in the *Virginia Pilot/Ledger Star*. Admiral Carter, however, made no statements to the newspaper and instructed his staff to make no comments to the press. Following an investigation, civilian authorities of the Naval Base's security force imposed a two-day suspension on petitioner for his conduct during the traffic stop and for failing to report it to his superiors. After arbitration, the two-day suspension was reduced to a letter warning. Pet. App. A4.

3. Petitioner filed an action against Admiral Carter in state court seeking damages for slander, libel, insulting words, intentional infliction of emotional distress, and tortious interference with contractual and business relations. Petitioner initially sought $500,000 in compensatory damages and $1,000,000 in punitive damages, but he later reduced his claim to $60,000 in compensatory damages and $40,000 in punitive damages. The United States Attorney certified on behalf of the Attorney General that Admiral Carter was acting within the scope of his employment under the Westfall Act. The United States Attorney removed the suit to federal district court, where he filed a motion to substitute the United States as the sole defendant, see 28 U.S.C. 2679(d), and to dismiss

the suit on the ground that the United States has retained its immunity from the torts petitioner alleged, see 28 U.S.C. 2680(h). The district court, however, denied the motion for substitution. Pet. App. A5.

Admiral Carter and the United States appealed the district court's denial of the substitution motion. A divided court of appeals panel affirmed the district court's decision, Pet. App. A40-A67, but the en banc court granted a motion for rehearing and vacated the panel opinion. *Id.* at A39. The full court subsequently reversed, holding on three alternative grounds that the United States should be substituted for Admiral Carter as the sole defendant. *Id.* at A1-A38. First, the court held that the Attorney General's scope-of-employment certification conclusively requires substitution and is not subject to judicial review. *Id.* at A7-A10. Second, the court of appeals determined that "even if the certification should not be conclusive in all cases * * *, it must be treated as conclusive in a case such as this where a military officer is inquiring into a report to him concerning improper performance of duty." *Id.* at A10. Finally, the court determined that Admiral Carter, in any event, was acting within the scope of his employment under state *respondeat superior* principles when the incident occurred. *Id.* at A18.

The court of appeals remanded the case with instructions to substitute the United States and to enter judgment in favor of the government, because the United States has not waived its immunity from petitioner's claims. Pet. App. A18. See *United States* v. *Smith*, 499 U.S. 160 (1991) (holding that the Westfall Act applies—and requires substitution of the

United States in place of federal employees sued on account of acts within the scope of their employment—even if an exception to the FTCA bars the pursuit of the claim against the United States).

ARGUMENT

Petitioner challenges the court of appeals' determination that Admiral Carter was acting within the scope of his office for purposes of the Westfall Act when he allegedly slandered petitioner during a conversation about petitioner's work-related conduct. Petitioner disagrees with the court of appeals' ruling that the Attorney General's scope-of-employment certification is conclusive in the circumstances presented here, Pet. App. 9-15, and with its ruling that, assuming arguendo that a court could review the certification, the certification was proper under the state law *respondeat superior* precedents that govern the inquiry, *id.* at 15-23. Those rulings do not warrant further review.

1. The Westfall Act does not specifically address whether a plaintiff may raise a judicial challenge to substitution of the United States on the ground that the Attorney General erred in certifying that the defendant acted within the scope of federal office or employment. Immediately after enactment of the Westfall Act, the United States took the position that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The United States subsequently reconsidered the question, however, and concluded that the certification decision is reviewable. See Brief for the United States in Opposition in *Lehtinen* v. *S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789). The United States adhered to that position in

representing Admiral Carter below, and it adheres to that position in representing Admiral Carter in this Court.

As petitioner notes, the court of appeals' ruling below that the Attorney General's certification is nonreviewable is not only inconsistent with the position that the United States took in representing Admiral Carter, but it also conflicts with the rulings of seven other courts of appeals.[1] Despite the conflict, this case does not present an appropriate occasion to resolve the matter. To be sure, this Court frequently grants petitions for a writ of certiorari to resolve conflicts among the courts of appeals on questions of public importance. The Court decides those questions, however, "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Export*,

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[1] See *Brown* v. *Armstrong*, 949 F.2d 1007 (8th Cir. 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F.2d 740 (9th Cir. 1991); *Hamrick* v. *Franklin*, 931 F.2d 1209 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 112 S. Ct. 62 (1991); *Melo* v. *Hafer*, 912 F.2d 628 (3d Cir. 1990), aff'd on other grounds, 112 S. Ct. 358 (1991); *Nasuti* v. *Scannell*, 906 F.2d 802 (1st Cir. 1990); *Arbour* v. *Jenkins*, 903 F.2d 416 (6th Cir. 1990). See also *Wood* v. *United States*, 991 F.2d 915 (1st Cir. 1993) (en banc); *Aliota* v. *Graham*, 984 F.2d 1350 (3d Cir. 1993), petition for cert. pending, No. 92-1863 (filed May 19, 1993). The Fourth Circuit purported to align itself with the Fifth and Tenth Circuits (Pet. App. A9), which had suggested in cases in which scope of employment was not challenged that the Attorney General's certification was to be given conclusive effect. See *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990); *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989). Those cases were on appeal while the Department of Justice was reconsidering its position on reviewability.

Inc., 359 U.S. 180, 184 (1959). "Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *Ibid.* The Court does not exercise jurisdiction to resolve questions in situations where its decision "would in effect be merely an advisory opinion on a delicate subject." *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 620 (1950).

The Court should not resolve the reviewability issue posed here, despite the conflict among the courts of appeals, because the court of appeals concluded that even if the Attorney General's scope-of-employment certification is reviewable, "the district court erred in concluding that Admiral Carter's actions were outside the scope of employment." Pet. App. A12. As we explain in greater detail below, that alternative holding, which does not present a significant issue of law warranting this Court's review, is clearly correct. Thus, regardless of this Court's resolution of the reviewability issue, the result in this case would not change. If the Court wishes to resolve the conflict among the courts of appeals on that issue, it should await a case in which its decision would have a bearing on the outcome of the litigation.[2]

2. Petitioner does not dispute the court of appeals' conclusions that Admiral Carter was a federal officer and that, although his office and duties were defined by federal law, Virginia law governs whether Admiral

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[2] Should the Court grant the petition for a writ of certiorari, we would suggest that Admiral Carter be allowed leave to retain private counsel and to file his own brief on the merits, if he so chooses, to argue in favor of the conclusiveness of the Attorney General's scope certification.

Carter was acting within the scope of his office for purposes of tort liability. Pet. 16, 18 n.4. See Pet. App. A12-A13.[3] The Virginia Supreme Court has ruled that an employee's act is within the scope of employment if:

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and
>
> (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Kensington Assocs. v. *West*, 362 S.E.2d 900, 901 (Va. 1987). Even intentional torts are within the scope of employment if they satisfy those criteria. See *Tri-State Coach Corp.* v. *Walsh*, 49 S.E.2d 363, 366 (Va. 1948) (master may be liable for willful tort of employee acting within the scope of his employment).

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[3] Although federal law establishes and defines the office or employment relationship, see, *e.g.*, *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959) ("[t]he authority of a federal officer to act derives from federal sources"), state law provides the general principles for determining whether the employee has acted within the scope of that relationship. See *Williams* v. *United States*, 350 U.S. 857 (1955) (per curiam); *Brown* v. *Armstrong*, 949 F.2d 1007, 1012 n.7 (8th Cir. 1991); see also H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988) ("Under the FTCA, the issue of whether an employee was acting within the scope of his employment is governed by the law of the state in which the negligent or wrongful conduct occurred.").

Applying that test, the court of appeals held that "Admiral Carter was acting within the scope of employment when the incident occurred." Pet. App. A18. Under the Chief of Naval Operations' Instructions, Admiral Carter was responsible for the supervision of the Norfolk Naval Base's motor vehicle traffic program, including the behavior of civilian base police engaged in traffic management.[4] In addition, pursuant to Navy regulations, Admiral Carter also had authority to communicate directly with any subordinate, including any civilian employed by the Department of the Navy. 32 C.F.R. 700.602(a).[5]

Admiral Carter's alleged actions were fully consistent with the authority and responsibilities conferred upon him by those regulations. His conduct clearly fell within the scope of employment of a naval commander with overall responsibility for oversight and supervision of operations on all Atlantic Fleet naval bases, including motor vehicle operations.

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[4] The pertinent Naval Operations Instructions are reproduced in a regulatory addendum to the United States' court of appeals brief. See OPNAVINST 5530.14B (Department of the Navy Physical Security and Loss Prevention) ¶ 5.c. (1988); OPNAVINST 11200.5C (Motor Vehicle Traffic Supervision) ¶ 1-4.b.(1) and ¶ 4-3.a.(3) (1988).

[5] It is undisputed that Admiral Carter was on duty when the incident occurred. See Pet. 21. Under Navy regulations, Admiral Carter was "at all times subject to naval authority" while on active service and could "exercise authority over all persons who [were] subordinate to [him]." 32 C.F.R. 700.811(a) (1990). Therefore, as the court of appeals held, "Admiral Carter had the authority to summon a base police officer at any time. * * * He patently had the authority to summon [petitioner] to his home and he exercised that authority." Pet. App. A15.

Certainly, the discretionary means chosen by Admiral Carter fell within the "outer perimeter" of his responsibilities. See *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959); *Wallen* v. *Domm*, 700 F.2d 124, 126 (4th Cir. 1983) (per curiam); *George* v. *Kay*, 632 F.2d 1103, 1106 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981).

Petitioner asserts that Admiral Carter was not acting within the scope of his office because he "acted solely at his wife's behest * * * in his capacity as an irate father and husband, rather than as Commander in Chief of the Atlantic Fleet." Pet. 18. The court of appeals correctly rejected that argument. As the court explained, nothing in the record suggests that Admiral Carter's summoning of a base police officer arose "wholly from some external, independent, and personal motive." Pet. App. A14. "Undisputed contemporaneous written records corroborate that Admiral Carter had previously and consistently expressed his displeasure with the conduct of the base police, and that he took action to remedy the situation." *Ibid.* Prior to the incident involving petitioner, Admiral Carter expressed his concerns about rude conduct by base police to the base commander, Rear-Admiral Pappas. *Ibid.* Admiral Carter's notes indicate an increasing level of frustration because of the difficulties in identifying the police officers who were causing the problems. *Id.* at A15. Thus, "it is not surprising that he took direct and immediate action when his wife was able to identify a policeman who had acted rudely." *Ibid.*[6]

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[6] In any event, Virginia law makes clear that an employee who acts in furtherance of his employer's interests may be within the scope of his employment even though, at the same time, he is doing something to serve a purpose of his own. *Ken-*

Petitioner also contends that Admiral Carter "created a conflict between his private interest and the interest of the United States," in violation of "Bedrock Standards of Conduct for Department of the Navy Personnel" at 32 C.F.R. 721.18. Pet. 17-18. As a consequence, petitioner concludes, Admiral Carter acted "upon his own responsibility." Pet. 18, quoting 32 C.F.R. 700.702(b). Petitioner contends that by calling for security force supervisory personnel to report to his on-base quarters and by speaking to petitioner, Admiral Carter violated Navy regulations enjoining naval personnel from engaging in conduct —normally in dealing with government contractors —that might create an appearance of a conflict of interest or a loss of impartiality. That argument is without merit.

The mere fact that Admiral Carter's wife alerted him to discourtesy by a police officer did not preclude Admiral Carter from responding to that conduct. It did not prevent Admiral Carter from attempting to determine who the patrolman was or from filing an administrative complaint, which, as the record discloses, is all that Admiral Carter subsequently sought to do. See Pet. App. A3. Nor did it prevent Admiral Carter from questioning the patrolman when

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sington Assocs., 362 S.E.2d at 901 (acts naturally incident to the employer's business are within the scope of employment unless they "arise *wholly* from some external, independent, and personal motive") (emphasis added). In this instance, even if Admiral Carter acted in part on behalf of his wife and daughter in reprimanding petitioner, he also acted in furtherance of the Navy's interests. See *Bryant* v. *Bare*, 64 S.E.2d 741, 745 (Va. 1951) ("The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.").

he was produced by a security force supervisor. In any event, even assuming the cited standards of conduct do have applicability to this case, petitioner is mistaken in his premise that the mere violation of an employer's regulations automatically takes an employee's conduct outside the scope of his office or employment. The test for scope of employment under Virginia law "is not whether the tortious act itself is a transaction * * * within the scope of the agent's authority, but whether the service itself in which the tortious act was done was * * * within the scope of such authority." *United Brotherhood of Carpenters* v. *Humphreys*, 127 S.E.2d 98, 102 (Va. 1962), cert. denied, 371 U.S. 954 (1963). Consequently, even if a specific act is forbidden by the employer, that act can be within the scope of employment. See Restatement (Second) of Agency § 230 (1958).[7]

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[7] As the court of appeals explained:

> Few government authorities are authorized to commit torts as part of their line of duty, but to separate the activity that constitutes the wrong from its surrounding context—an otherwise proper exercise of authority—would effectively emasculate the immunity defense. Once the wrongful acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it is not needed.

Pet. App. A15-A16 (quoting *Wallen* v. *Domm*, 700 F.2d at 126). See also *Jordan* v. *Hudson*, 690 F. Supp. 502, 505 (E.D. Va. 1988) ("participating in a discussion regarding work-related matters 'is certainly within [a supervisor's] discretionary powers'"), aff'd, 879 F.2d 98 (4th Cir. 1989). Other circuits have reached similar conclusions. See, *e.g.*, *Dretar* v. *Smith*, 752 F.2d 1015, 1017-1018 (5th Cir. 1985); *Araujo* v. *Welch*, 742 F.2d 802, 805-806 (3d Cir. 1984) (government officials must be

Petitioner's reliance on various cases holding that an employee was acting outside the scope of his employment because he violated his employer's specific instructions (Pet. 19-21) is unpersuasive. In none of those cases did the court hold that the employee was acting outside the scope of his employment merely because he violated his employer's instructions on how to carry out his duties. Rather, the employee was held to be acting beyond the scope of his employment because he abandoned the employer's business altogether, incidentally violating a specific instruction that defined the very scope of employment. Hence, the employee was found to be acting for a purpose wholly his own.[8] By contrast, a superior who, in the heat of the moment, calls a subordinate a liar does not automatically act outside the scope of his employment simply because such language may be

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able to speak freely to their employees about work-related matters without fear of suit).

[8] The cases relied on by the plaintiff involve either employees who deviated from time and place instructions with regard to the use of a vehicle to pursue interests wholly their own, *White* v. *Hardy*, 678 F.2d 485, 487 (4th Cir. 1982); *Witt* v. *United States*, 319 F.2d 704 (9th Cir. 1963); *United States* v. *Alexander*, 234 F.2d 861, 866 (4th Cir.), cert. denied, 352 U.S. 892 (1956); *Connor* v. *Bragg*, 123 S.E.2d 393, 397 (Va. 1962); *McNeill* v. *Spindler*, 62 S.E.2d 13, 17-18 (Va. 1950); *Master Auto Serv. Corp.* v. *Bowden*, 19 S.E.2d 679, 680-681 (Va. 1942); *Kavanaugh* v. *Wheeling*, 7 S.E.2d 125 (Va. 1940); or employees whose conduct was not within the general scope of the purposes for which they were employed, *Green* v. *James*, 473 F.2d 660, 662 (9th Cir. 1973); *Wrynn* v. *United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961); *Meek* v. *Graybeal*, 78 S.E.2d 593 (Va. 1953); *Thalhimer Bros.* v. *Shaw*, 159 S.E. 87 (Va. 1931). None involved a purported violation of general instructions on how to carry out duties within the scope of the employee's office.

defamatory. Thus, even assuming Admiral Carter abused his authority, his alleged conduct remains the kind of quintessentially supervisory action that falls within the scope of supervisory authority.[9]

This Court normally accepts the determination of local law by the courts of appeals, and that deference "generally render[s] unnecessary review of their decisions in this respect." *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975). See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Commissioner of Internal Revenue* v. *Estate of Bosch*, 387 U.S. 456, 462 (1967). That deference is appropriate here. In this case, the Fourth Circuit's application of state law was not "clearly wrong," see *Brockett*, 472 U.S. at 500 n.9, and that fact-laden inquiry does not warrant reconsideration by this Court.

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[9] See *Slaughter* v. *Valleydale Packers, Inc.*, 94 S.E.2d 260, 265 (Va. 1956) (suggesting that defamatory statements may well be within the scope of employment). Cf. *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990) (military supervisor of nurse assistant at military hospital acted within the scope of employment when she allegedly struck an assistant during a heated work-related conversation); *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989) (supervisors of a federal employee acted within the scope of employment in making defamatory statements); *Moreno* v. *Small Business Admin.*, 877 F.2d 715 (8th Cir. 1989) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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